

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 January 2014

Public Authority: University of Sussex

Address: Sussex House
Falmer
Brighton
BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested University of Sussex ('the university') to disclose a copy of the business case it produced in April 2012 about the university's proposals to outsource its catering and facilities management. Initially the university withheld the entire report under sections 41 and 43 of the FOIA.
2. During the Commissioner's investigation the university decided to disclose the majority of the report and a small selection of information from Appendix D. The notice has focussed on the remaining withheld information in Appendix D and the university's application of section 41 of the FOIA to this information.
3. The Commissioner's decision is that the university acted appropriately by withholding the remaining withheld information under section 41 of the FOIA. He therefore requires no further action to be taken.

Request and response

4. On 5 March 2013, the complainant wrote to the university and requested information in the following terms:

"I am writing to request, under the Freedom of Information Act, copies of certain documents pertaining to the recent public procurement process initiated by the University of Sussex. Specifically, it has stated in a public forum by the Vice-Chancellor that the University of Sussex engaged with an outside company to produce a feasibility study of the

outsourcing prior to the public procurement process. I would like this in its entirety.”

5. The university responded on 4 April 2013. It stated that it considered the requested information was exempt from disclosure under sections 41 and 43 of the FOIA.
6. The complainant contacted the university the same day to request an internal review.
7. The university responded on 2 May 2013. It informed the complainant that it remained of the opinion that the requested information was exempt from disclosure under sections 41 and 43 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 3 May 2013 to complain about the way his request for information had been handled. Specifically, he asked the Commissioner to consider the university's application of sections 41 and 43 of the FOIA to the withheld information.
9. The university confirmed that it held one document that fell within the scope of this request and this was titled – “University of Sussex Business Case: Extension of Outsourcing in Facilities Management Services and Catering and Conferencing Services May 2012”.
10. The complainant did believe further recorded information was held and there were a series of emails between him and the university about this. The university answered his questions and confirmed that it only held the above document – nothing more and felt some confusion may have been caused from this document being referred to in different ways. For the purposes of this investigation, the complainant was willing to accept the university's position that no further recorded information is held.
11. To begin with the university withheld the document in its entirety. However, during the Commissioner's investigation the university decided to release the majority of the business case to the complainant. The university chose only to withhold the following information:
 - 1) One percentage figure – which details the university's calculation of the financial saving it anticipates to make from this project.
 - 2) The majority of appendix D. The appendix contains a summary of information provided by a number of suppliers who were approached as a result of this project and asked to provide frank information in

relation to their specific experience of a number of issues. Two suppliers agreed for their information to be disclosed – this was therefore forwarded to the complainant. However, the remaining suppliers requested that the university withhold the information they provided under section 41 of the FOIA.

12. The complainant has raised no issue with the university's decision to withhold the percentage of anticipated savings (item 1). This notice will therefore focus on the remaining withheld information in appendix D only (item 2). The university applied section 41 of the FOIA to this appendix – it did not apply section 43. This was applied to other information which has either been disclosed or is not the focus on the remainder of this notice.

Reasons for decision

13. Section 41 of FOIA states that information is exempt from disclosure if –
- (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

Was the information obtained by the university from any other person?

14. Appendix D contains information a number of suppliers provided to PWC UK about certain aspects of the project. PWC UK was commissioned by the university to produce the business case document.
15. The Commissioner is satisfied that the requested information was obtained by PWC UK, on behalf of the university, from a number of third party suppliers and therefore this element of the exemption is met.
16. The Commissioner now needs to consider whether disclosure of the remaining sections of this appendix would constitute an actionable breach of confidence.

Would disclosure be an actionable breach of confidence?

17. The Commissioner considers the relevant consideration here is whether the requested information has the necessary quality of confidence, was imparted in circumstances that gave rise to a duty of confidence and whether disclosure would cause any detriment to the confider. In this

case there are a number of confiders – each of the remaining suppliers that participated with the project which did not consent to disclosure.

18. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
19. The university argued that the remaining suppliers provided information to PWC UK about their own experiences and approaches to business. These suppliers consider this information is commercially sensitive and confirmed that it is not otherwise available to the public.
20. Any information which a third party considers is commercially sensitive cannot be regarded as trivial. And as these remaining suppliers have confirmed that the information contained in appendix D is not otherwise available to the public and the Commissioner has not received any evidence to the contrary, he is satisfied that this element of the exemption is met.
21. The Commissioner now needs to consider whether the information was supplied in circumstances giving rise to a duty of confidence.
22. The university confirmed that the remaining suppliers were of the understanding that this information would only be shared within the university for the purposes of the project and had no expectation that this information could be released into the public domain. It said that these suppliers provided free and frank information about their experiences and approaches to business in order to assist the university with this project and these suppliers confirmed that they may be unwilling to do so in the future should appendix D be disclosed. A non-disclosure agreement was entered into between the university and the remaining suppliers in respect of this information.
23. The university confirmed that due to the remaining suppliers' expectations, the commercial sensitivity of this information and the non-disclosure agreements in place, it owed each and every one a duty of confidence.
24. The Commissioner notes that the university contacted as many of the suppliers as it could to obtain their views of the potential disclosure of this information. He understands that the majority responded. Two agreed for their information to be disclosed, as paragraph 11 explains. However, the remaining suppliers strongly objected. They all stated that they only supplied this information to the university with the understanding that it would only be used for the project and that it would remain confidential. The remaining suppliers confirmed that they

entered into non-disclosure agreements with the university and therefore had the expectation that the information would not be disclosed into the public domain.

25. Due to the clear expectations the suppliers had with regards to this information and the existence of non-disclosure agreements, the Commissioner can only agree that the information provided by each remaining supplier was supplied to the university in circumstances giving rise to a duty of confidence.
26. As the Commissioner is satisfied that the information was imparted in circumstances giving rise to a duty of confidence, he now needs to consider whether there would be any detriment to the confiders (the remaining suppliers) if this confidence was breached.
27. Where commercial information is purported to have been imparted in confidence (which is the case here) the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confiders concerned (each of the remaining suppliers) for the exemption to be engaged.
28. The remaining suppliers stated that disclosure would cause them commercial detriment in respect of their abilities to compete fairly with existing competitors. The suppliers stated that they provided free and frank information to the university, the contents of which would be beneficial to other competitors. The information provided detailed each suppliers experience or lack of it in certain areas. Disclosure of this information could enable competitors to match their offers or leverage areas where suppliers are not experienced and use this information to potentially win over potential clients.
29. The remaining suppliers also confirmed that the information contained details of their management fees and profit. If this information was released competitors could use it to revise their own pricing structures in such a way to ensure that they outbid these suppliers. Appendix D also contains specific strategies and suggestions made by these suppliers. If competitors had access to this information they could either use these strategies or develop ideas further in order to gain a more competitive edge.
30. The Commissioner has reviewed this information and considered the arguments supplied by the university in depth. He does not agree that the remaining withheld information contains details of management fees. However, he does note that there is reference to some profit margins that were referred to by two suppliers. Although the two suppliers are not named, it is acknowledged that only a handful of suppliers were asked to assist with this project and it may be possible to

link this information to certain suppliers, whether correct or incorrectly. Even if the information cannot be linked, the Commissioner accepts that this may be useful to competitors – in that they would know that two suppliers had calculated certain profit margins for this type of project.

31. The Commissioner also notes that the remaining withheld information does contain some frank information about suppliers' experiences, expertise or lack of it in certain areas. He agrees that this information could be useful to competitors, as it identifies their strengths and potential weaknesses which could then be to their disadvantage.
32. For the above reasons, the Commissioner has decided that disclosure could cause commercial detriment to the remaining suppliers and therefore this element of this exemption is met.
33. Although section 41 of the FOIA is an absolute exemption and is therefore not subject to the public interest test outlined in the FOIA, case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
34. The Commissioner must therefore now consider whether there is a public interest defence on which the university could rely. Public interest considerations under section 41 are different to the considerations of the public interest test outlined in the FOIA. In the FOIA a presumption in favour of disclosure must always be applied. However, under section 41 the starting point is that the information must not be disclosed *unless* the public interest arguments in favour of disclosure exceed the public interest arguments in favour of maintaining the confidence.
35. The university stated that it accepted there is a public interest in openness and accountability in the activity of public bodies and also in allowing individuals to understand decisions made by public bodies and potentially allowing the same to be challenged. However, the university felt this public interest had already been met by the information it had already disclosed relating to this project and that there is a stronger public interest in ensuring companies can compete fairly and without disadvantage.
36. In correspondence to the Commissioner the complainant outlined that he felt there was a huge public interest in the disclosure of this information. He stated that there has been a considerable amount of opposition to this project locally – demonstrations and petitions and little public engagement. The requested information is therefore required in order to assist public debate and enable those concerned about the proposals to understand more clearly the university's intentions.

37. The Commissioner has given this matter careful consideration. He considers the public interest has already been met by the information disclosed by the university. He notes that the majority of the report in question has now been released- the only information that remains is information that was supplied to the university on a confidential basis and which would be likely to cause commercial detriment to those firms that supplied it if it were to be released. He does not consider the remaining information would add to public debate or help those opposed to the project to voice their concerns or understand more clearly the university's proposals.
38. The Commissioner has accepted that disclosure could cause the remaining suppliers concerned commercial detriment and he does not consider there is any overwhelming further public interest in this case that would warrant prejudicing the ability of these firms to compete.
39. To conclude, the Commissioner is satisfied that section 41 of the FOIA applies to the remaining withheld information and therefore it should not be disclosed.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF